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Case No.

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, *Petitioner*

vs.

MYRON FRANKLIN, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE FOURTH DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the decision by the Fourth District Court of Appeal in Franklin v. State, 876 So.2d 607 (Fla. 4th DCA 2004), conflicts with Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), and California v. Prysock, 453 U.S. 355, 360, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981), by violating the Court's holding that no talismanic incantation is required in conveying to a suspect what his rights are under Miranda?

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

OPINION BELOW 1

CONSTITUTIONAL PROVISIONS 1

JURISDICTION 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

REASONS FOR GRANTING THE WRIT 5

THE DECISION BY THE FOURTH DISTRICT COURT OF APPEAL IN FRANKLIN v. STATE, 876 So.2d 607 (FLA. 4TH DCA 2004), CONFLICTS WITH THIS COURT'S DECISIONS IN MIRANDA v. ARIZONA, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), AND CALIFORNIA v. PRYSOCK, 453 U.S. 355, 360, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981), BY VIOLATING THE HOLDING THAT NO TALISMANIC INCANTATION IS REQUIRED IN CONVEYING TO A SUSPECT WHAT HIS RIGHTS ARE UNDER MIRANDA?

CONCLUSION 13

CERTIFICATE OF SERVICE 14

TABLE OF CITATIONS

Cases — Page(s)

Bridgers v. Texas,
532 U.S. 1034, 121 S.Ct. 1995,
149 L.Ed.2d 779 (2001) 6

Brown v. Crosby,
249 F.Supp.2d 1285 (U.S.S.D. Fla. 2003) 9

California v. Prysock,
453 U.S. 355, 360, 101 S.Ct. 2806,
69 L.Ed.2d 696 (1981) 5-7, 9

Chambers v. United States,
391 F.2d 455 (5th Cir. 1969) 13

Coyote v. United States,
380 F.2d 305 (10th Cir.), cert. denied,
389 U.S. 992, 88 S. Ct. 489, 19 L.Ed.2d 484 (1967) 10

Dickerson v. United States,
530 U.S. 428 (2000) 8

Duckworth v. Eagan,
492 U.S. 195, 109 S.Ct. 2875,
106 L.Ed.2d 166 (1989) 6, 7

Evans v. Swenson,
455 F.2d 291 (8th Cir.), cert. denied,
408 U.S. 929, 92 S.Ct. 2508, 33 L.Ed.2d 342 (1972) 10, 11

Fendley v. United States,
384 F.2d 923 (5th Cir. 1967) 13

Franklin v. State,
876 So.2d 607 (Fla. 4th DCA 2004) 1, 3

Frasier v. Cupp,
394 U.S. 731, 739, 89 S.Ct. 1420,
22 L.Ed.2d 684 (1969) 9

Globe v. State,
877 So.2d 663 (Fla.) rehearing denied,
2004 Fla. LEXIS 974 (Fla. July 1, 2004) 9

Johnson v. New Jersey,
384 U.S. 719, 86 S.Ct. 1772,
16 L.Ed.2d 882 (1966) 9

Michigan v. Tucker,
417 U.S. 443, 444, 94 S.Ct. 2357,
41 L.Ed.2d 182 (1974) 8, 9, 13

Miranda v. Arizona,
384 U.S. 436, 16 L.Ed.2d 694,
86 S.Ct. 1602 (1966) 4-10, 12, 13

Missouri v. Seibert,
124 S.C.t 2601 (2004) 6

Pemberton v. Peyton,
288 F.Supp. 920 (E.D. Va. 1968) 13

Roberts v. State,
874 So.2d 1225 (Fla. 4th DCA 2004) 4, 6, 9, 10

Sweeney v. United States,
408 F.2d 121 (9th Cir. 1969) 10

Thompson v. State,
548 So.2d 198 (Fla. 1989) 9

United States v. Adams,
484 F.2d 357 (7th Cir. 1973) 11

United States v. Anthon,
648 F.2d 669 (10th Cir.), cert. denied,
454 U.S. 1164, 102 S.Ct. 1039, 71 L.Ed.2d 320 (1981) 13

United States v. Averell,
296 F.Supp. 1004 (E.D.N.Y. 1969) 13

United States v. Bland,
908 F.2d 471 (9th Cir. 1990) 13

United States v. Burns,
684 F.2d 1066 (2d Cir.), cert. denied,
459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1982) 11

United States v. Caldwell,
954 F.2d 496 (8th Cir.), cert. denied,
506 U.S. 819, 113 S.Ct. 65, 121 L.Ed.2d 32 (1992) 11

United States v. Contreras,
667 F.2d 976 (11th Cir. 1982), cert. denied,
459 U.S. 849, 103 S.Ct. 109, 74. L.Ed.2d 97 (1982) 9

United States v. Cusumano,
429 F.2d 378 (2d Cir.), cert. denied,
400 U.S. 830, 91 S.Ct. 61, 27 L.Ed.2d 61 (1970) 11

United States v. Fox,
403 F.2d 97 (2d Cir. 1968) 9, 13

United States v. Frankson,
83 F.3d 79 (4th Cir. 1996) 11

United States v. Hernandez,
93 F.3d 1493 (10th Cir. 1996) 9

United States v. Noti,
731 F.2d 610 (9th Cir. 1984) 13

United States v. Oliver,
505 F.2d 301 (7th Cir. 1974) 13

United States v. Vanterpool,
394 F.2d 697 (2d Cir. 1968) 10, 12

West v. State,
876 So.2d 614 (Fla. 4th DCA 2004) 4, 6

Windsor v. United States,
389 F.2d 530 (5th Cir. 1968) 13

Constitutional Provisions

Fifth Amendment, United States Constitution 1

Fourteenth Amendment, United States Constitution 2, 5

Sixth Amendment, United States Constitution 2

Other Authorities

28 U.S.C. §1257 2

Martin J. McMahon, Annotation, Necessity That Miranda Warnings Include Express Reference to Right to Have Attorney Present During Interrogation,
77 A.L.R. Fed. 123 (2004) 10

Rule 10 of the Rules of the Supreme Court
of the United States 2

Webster's New World Dictionary, Second College Edition
(William Collins & World Publishing Co., 1978) 8

Case No.

IN THE SUPREME COURT OF THE UNITED STATES

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MYRON FRANKLIN, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The opinion below has been reported at Franklin v. State, 876 So.2d 607 (Fla. 4th DCA 2004) (Appendix A).

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

> No person shall be ... compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law... .

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

JURISDICTION

Petitioner, State of Florida, seeks jurisdiction pursuant to 28 U.S.C. § 1257 and Rule 10 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

On June 16, 2004, the Fourth District Court of Appeal for the State of Florida entered its opinion on direct appeal, and on July 22, 2004, denied rehearing, rehearing en banc, and certification of question of great public importance. (App. A). The State then filed a motion to stay. On September 17, 2004, the Fourth District granted that motion, staying mandate for sixty days. Petitioner now seeks certiorari review.

STATEMENT OF THE FACTS

Respondent, Myron Franklin was convicted of robbery with a firearm, aggravated fleeing and eluding, and grand theft of a motor vehicle. He gave two statements to the police. Prior to those statements, Franklin was read his rights from a card issued by the Broward County Sheriff's Office. That card stated (T 94-95):

Before I ask you any questions, I want to advise you of your Constitutional Rights.

You have the right to remain silent.

Anything you say can and will be used against you in a court of law.

You have the right to talk with a lawyer before any questioning.

If you cannot afford a lawyer, one will be appointed to represent you before any questioning.

Respondent agreed to waive his rights and speak to law enforcement (T 95). At the beginning of Respondent's first taped statement, Franklin acknowledged that he had been read his rights and stated that he understood those rights (T 458). Similarly, at the start of Respondent's second taped statement taken on the same date, Franklin confirmed that he still understood his rights (T 474). At no time did he invoke his right to have counsel present.

The Fourth District Court of Appeal of the State of Florida (hereinafter "the Fourth District") reversed the conviction in Franklin v. State, 876 So.2d 607 (Fla. 4th DCA 2004) (Appendix A), holding that the Miranda warnings Respondent received prior to giving his statements were deficient in the same manner the warnings were deficient in two other contemporaneous opinions issued by that court, Roberts v. State, 874 So.2d 1225 (Fla. 4th DCA 2004), and West v. State, 876 So.2d 614 (Fla. 4th DCA 2004). That is, the warnings failed to advise him that he had the right to have an attorney present "during questioning" and, as a result, he did not knowingly, voluntarily and intelligently waive his rights under Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966).

REASONS FOR GRANTING THE WRIT

THE DECISION BY THE FOURTH DISTRICT COURT OF APPEALIN FRANKLIN v. STATE, 876 So.2d 607 (FLA. 4TH DCA 2004), CONFLICTS WITH THIS COURT'S DECISIONS IN MIRANDA v. ARIZONA, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), AND CALIFORNIA v. PRYSOCK, 453 U.S. 355, 360, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981), BY VIOLATING THE HOLDING THAT NO TALISMANIC INCANTATION IS REQUIRED IN CONVEYING TO A SUSPECT WHAT HIS RIGHTS ARE UNDER MIRANDA.

The instant case provides an opportunity for the Court to resolve a split in the Circuits and resolve a growing conflict amongst state courts regarding the adequacy of Miranda[1] warnings in cases where, as here, a suspect was expressly advised of the right to consult with counsel before questioning, but not "expressly advised of the right to have an attorney present during interrogation". Provided an opportunity to entertain this identical issue several years earlier, this Court declined certiorari review but several justices observed that "if the problem purportedly present here proves to be a recurring one, ...it may well warrant this Court's attention." See Bridgers v. Texas, 532 U.S. 1034, 121 S.Ct. 1995, 149 L.Ed.2d 779 (2001).[2] Due to the obvious conflict in the circuits, as well as the far-reaching effects of the state court's decision, Petitioner urges this Court to grant review to resolve the

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[1] Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966)

[2] While those comments were not particularly favorable, since the three Justices voiced concerns as to the issue for any future case, reversal is warranted in this case based on the arguments presented and authorities cited herein which were not developed in the Bridgers case.

conflict. See generally Missouri v. Seibert, 124 S.C.t 2601 (2004)(granting certiorari to resolve conflict in lower courts regarding propriety of "midstream" Miranda warnings during interrogation).

The warnings given to respondent included the following two statements:

> You have the right to talk with a lawyer before any questioning.
>
> If you cannot afford a lawyer, one will be appointed to represent you before any questioning.

The Fourth District concluded that the above passage was deficient, citing two other opinions issued by the Fourth District, Roberts v. State, 874 So.2d 1225 (Fla. 4th DCA 2004), and West v. State, 876 So.2d 614 (Fla. 4th DCA 2004) (App. A-C). In all three cases, the court concluded that omission of the word **during** when advising a defendant of his right to have an attorney present was fatally deficient. The appellate court decided that informing someone that they have the right to speak to a lawyer and have that lawyer present before any interrogation commences, **only** conveyed that the lawyer would "then be required to leave his client once the interrogation began." The court's decision completely ignores the logical and common sense meaning of the warnings that were given and artificially inflates the significance of the word "during." The analysis employed by the state appellate court conflicts with the decisions of this Court in California v. Prysock, 453 U.S. 355, 360, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981), Duckworth v. Eagan, 492 U.S. 195, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989), and Miranda itself. Those decisions make clear that "no talismanic incantation is required" to satisfy the Miranda requirements. Prysock, 453 U.S. at 359; and, [t]he inquiry is simply whether the warnings reasonably 'conve[y] to a [suspect] his rights as required by Miranda.'" Duckworth, 492 U.S.

15, 203 (*quoting* Prysock). The state court's decision completely ignores these edicts.

The Miranda warning in the case at bar closely tracks the language of Miranda wherein this Court admonished that a person in custody "must be warned **prior to** any questioning that he has the right to the presence of an attorney. Miranda, 384 U.S. at 479-480 (emphasis supplied). In Miranda, the Court held:

> To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford **an attorney one will be appointed for him prior to any questioning if he so desires.** Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Miranda, 384 U.S. at 479 (emphasis added). Some thirty-four years after Miranda, the Court reaffirmed the import of those warnings in Dickerson v. United States, 530 U.S. 428, 435 (2000).

The phrase "prior to," as defined in Webster's New World Dictionary, Second College Edition (William Collins & World Publishing Co., 1978), means "before in time," or the functional equivalent of the term "before." The rights administered herein connote exactly the rights prescribed in Miranda and were adequate, as contemplated by the Court, to advise Respondent of his rights. Neither Miranda nor Dickerson require any additional language to ensure that a defendant is further informed of the services of counsel under the Constitution.

The opinion below completely ignores the obvious and common sense reality that an average person of reasonable intelligence would understand the phrases, "You have the right to talk with a lawyer **and have a lawyer present** before any questioning" followed by "[i]f you cannot afford a lawyer, one will be appointed to represent you before any questioning if you wish," to mean an attorney will be provided before questioning for the purposes of having the attorney present during questioning. Beyond per adventure, the right to an attorney "during" questioning was clearly conveyed in the warning given here.

Nothing in this case indicates that Respondent's statement to police was an act of "compulsory self incrimination" brought on by the omission of the words 'and during' in the phrase "you have the right to talk to an attorney and have an attorney present before any questioning." Michigan v. Tucker, 417 U.S. 443, 444, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974). Any allegation that Respondent was somehow coerced by the form of the warning into making statements to police is simply fallacious. The Court recognized, in Tucker, supra, and Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), the Miranda safeguards were not intended to create a constitutional straightjacket.

Moreover, neither a "talismanic" incantation nor any prescribed language is required to serve the purposes of Miranda and an equivalent warning has been held to suffice. Prysock, 453 U.S. at 359. Prysock thus stands for the proposition that a Miranda warning is adequate if it fully informs the accused of his right to consult with an attorney prior to questioning and does not condition the right to appointed counsel on some future event." Cf. United States v. Contreras, 667 F.2d 976, 979 (11th Cir. 1982), cert. denied, 459 U.S. 849, 103 S.Ct. 109, 74 L.Ed.2d 97 (1982). See also, United States v. Hernandez, 93 F.3d 1493, 1502 (10th Cir. 1996) (although Spanish translation was imperfect, warnings that conveyed the substance of the suspect's rights were sufficient).

It is axiomatic that Miranda jurisprudence demands that the totality of the circumstances be considered in determining whether a Miranda warning is adequate to inform a suspect of his rights. United States v. Fox, 403 F.2d 97, 100 (2nd Cir. 1968); Brown v. Crosby, 249 F.Supp.2d 1285, 1291-92 (U.S.S.D. Fla. 2003). See also, Globe v. State, 877 So.2d 663 (Fla.), rehearing denied, 2004 Fla. LEXIS 974 (Fla. July 1, 2004) (similarly indicating that a totality of the circumstances analysis is required); Thompson v. State, 548 So.2d 198, 203-204 (Fla. 1989). This jurisprudence is based upon the decisions which make clear that, in determining whether a confession was obtained knowingly, intelligently and voluntarily, a "totality of the circumstances" analysis must be used. See Frasier v. Cupp, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969). The instant state court's decision is the antithesis of this Court's cases.

As has been noted, not only by the state appellate court in the Roberts case, but also by at least one legal commentator, federal courts have interpreted Miranda and Prysock differently, resulting in different conclusions as to the adequacy of Miranda warnings in cases where, as here, a suspect was expressly advised of the right to consult with counsel before questioning, but not expressly advised of the right to have an attorney present during interrogation. Roberts, supra; Martin J. McMahon, Annotation,

Necessity That Miranda Warnings Include Express Reference to Right to Have Attorney Present During Interrogation, 77 A.L.R. Fed. 123 (2004). For example, some federal courts have found that additional warnings, expressly referring to the right to an attorney during interrogation, were unnecessary. See Evans v. Swenson, 455 F.2d 291 (8th Cir.), cert. denied, 408 U.S. 929, 92 S.Ct. 2508, 33 L.Ed.2d 342 (1972); United States v. Vanterpool, 394 F.2d 697 (2d Cir. 1968); Coyote v. United States, 380 F.2d 305 (10th Cir.), cert. denied, 389 U.S. 992, 88 S.Ct. 489, 19 L.Ed.2d. 484 (1967). These courts deemed the omission of the warning insignificant, reasoning that the right to counsel during interrogation can be inferred from warnings given as to the right to counsel before interrogation.

For instance, in Coyote, the defendant was warned that "before making any statement he could consult a lawyer of his own choice." The court rejected the argument that the defendant was not sufficiently advised of his right to a lawyer during interrogation. The court noted that Miranda was not a ritual of words to be recited by rote according to didactic niceties and held that the warning was adequate, refusing to indulge in "semantical debates" as to the effect of the word "before." Id., at 308.

Instructively, in Sweeney v. United States, 408 F.2d 121, 124 (9th Cir. 1969), the defendant was told that he had the right to remain silent, that anything he said could be used against him, that he was entitled to an attorney, that if he could not afford one, one would be appointed, and that he could use the telephone. The Ninth Circuit ruled that this warning was adequate, reasoning that the mention of the right to counsel immediately following the mention of the right to remain silent would "be taken by most persons to refer to the contemplated interrogation." Id. A useful parallel can be drawn between this case and the Sweeney case, which supports the position that the combination of warnings given in the instant case would be taken by most persons to mean that they had the right to counsel during the contemplated interrogation. See also United States v. Burns, 684 F.2d 1066 (2d

Cir.), cert. denied, 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1982) (although agents simply told the defendant that he had the right to an attorney but did not expressly tell the defendant that he had the right to an attorney during questioning, their warnings were not constitutionally deficient when taken as a whole they made this right clear); United States v. Adams, 484 F.2d 357, 361-62 (7th Cir. 1973)(the failure to specifically inform the defendant of the right to counsel during interrogation was not fatal where the defendant was informed, more generally, that he had the right to counsel).

Similarly, in Evans v. Swenson, 455 F. 2d 291 (8th Cir.), cert. denied, 408 U.S. 929, 92 S.Ct. 2508, 33 L.Ed.2d 342 (1972), the appellant was advised that he could make a telephone call just prior to telling him that he had the right to an attorney. That was adequate as a warning because it "suggested" that he could call an attorney prior to questioning. The reference to the right to counsel just before interrogation clearly related to the present and to the immediately anticipated interrogation by the police officer. Likewise, in United States v. Cusumano, 429 F.2d 378 (2d Cir.), cert. denied, 400 U.S. 830, 91 S.Ct. 61, 27 L.Ed.2d 61 (1970), the court noted that the reference to the right to counsel following immediately on the warning as to the right to remain silent would be taken by most persons to refer to the contemplated interrogation and not to some other time. And, in United States v. Caldwell, 954 F.2d 496, 502 (8th Cir.), cert. denied, 506 U.S. 819, 113 S.Ct. 65, 121 L.Ed.2d 32 (1992), the Eighth Circuit rejected the argument that Caldwell was not adequately warned where he was told that he had the right to counsel because he should have understood that this right extended to the upcoming interrogation. See also, United States v. Frankson, 83 F.3d 79, 82 (4th Cir. 1996) (the bare bones advisement "you have the right to an attorney" was perfectly adequate where it communicated to the defendant that his right to an attorney began immediately and continued forward in time without qualification) .

And, the Second Circuit, in United States v. Vanterpool, 394 F.2d 697, 699 (2d Cir. 1968), held that Miranda was satisfied

even though the officer told the suspect that he had the right to consult with an attorney "at this time." The court, pointing out that the suspect had indicated his willingness to proceed without counsel after being so warned, ruled that the warning was adequate despite the use of the words "at this time."[3]

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[3] In addition to the federal precedent, there are any number of state decisions which support petitioner's position. In People v. Gillylem, 34 Mich.App. 393, 191 N.W.2d 96, 97 (Mich.App. 1971), the defendant was told she had the right to counsel **before** questioning but was not told she had the right to counsel **during** questioning. Her conviction was nonetheless affirmed on this ground, the Gillylem court stating "To advise an accused that he may have an attorney present before questioning is sufficient 'to fairly apprise an accused that he had the right to counsel **during** questioning.'" Id., at 395 (emphasis in original), citing People v. McClure, 29 Mich. App. 361 (Mich.App. 1971), and People v. Bynum, 21 Mich. App. 596 (Mich.App. 1970).

In contrast, other courts have chosen unjustly to expand Miranda urging that further express warnings of the right to an attorney during interrogation must be given. See United States v. Bland, 908 F.2d 471 (9th Cir. 1990); United States v. Noti, 731 F.2d 610 (9th Cir. 1984); United States v. Anthon, 648 F.2d 669 (10th Cir.), cert. denied, 454 U.S. 1164, 102 S.Ct. 1039, 71 L.Ed.2d 320(1981); United States v. Oliver, 505 F.2d 301 (7th Cir. 1974); Chambers v. United States, 391 F.2d 455 (5th Cir. 1969); Windsor v. United States, 389 F.2d 530, 533 (5th Cir. 1968); United States v. Fox, 403 F.2d 97 (2d Cir. 1968); Fendley v. United States, 384 F.2d 923 (5th Cir. 1967); United States v. Averell, 296 F.Supp. 1004 (E.D.N.Y. 1969); Pemberton v. Peyton, 288 F.Supp. 920 (E.D. Va. 1968).

Taken to its logical conclusion, law enforcement would be required to expressly and exhaustively inform a defendant that he is entitled to counsel before interrogation, during interrogation, immediately after interrogation and, indeed, every single minute of every day that his case is pending.[4]

Both the better reasoned cases and logical argument herein presented make clear that the warning in this case not only tracked the language of Miranda, it likewise satisfied Miranda because it adequately advised Franklin of the right to have counsel present during interrogation. Since the warning complied with Miranda, this Court should quash the decision of the Fourth District.

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[4] The Florida appellate courts have maintained, under an analysis of Miranda, that more was required. There has been no indication in the Florida appellate court's opinion that these additional warnings were required under the State Constitution.

CONCLUSION

The decision of the Fourth District Court of Appeal of Florida is erroneous. Certiorari review is warranted and should be granted to resolve the split in the federal courts and state courts on the Miranda issue.

Respectfully submitted,

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INDEX TO APPENDIX

Franklin v. State,
876 So. 2d 607 (Fla. 4th DCA June 16, 2004)
rehearing denied, 2004 Fla. App. LEXIS 11360
(Fla. 4th DCA July 22, 2004) A1-A3

Roberts v. State,
874 So. 2d 1225 (Fla. 4th DCA May 26, 2004)
rehearing denied, 2004 Fla. App. LEXIS 11878
(Fla. 4th DCA July 2, 2004) A4-A12

West v. State,
876 So. 2d 614 (Fla. 4th DCA June 16, 2004)
rehearing denied, 2004 Fla. App. LEXIS 11878
(Fla. 4th DCA July 30, 2004) A13-A20

MYRON FRANKLIN, Appellant,
v.
STATE OF FLORIDA, Appellee.

CASE NO. 4D03-741

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

876 So. 2d 607; 2004 Fla. App. LEXIS 8361; 29 Fla. L. Weekly D 1445

June 16, 2004, Opinion Filed

SUBSEQUENT HISTORY: Rehearing denied by *Franklin v. State, 2004 Fla. App. LEXIS 11360 (Fla. Dist. Ct. App. 4th Dist., July 22, 2004)*

Released for Publication July 22, 2004.

PRIOR HISTORY: Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; James I. Cohn, Judge; L.T. Case No. 01-20804CF10A.

DISPOSITION: Reversed and remanded.

LexisNexis(R) Headnotes

COUNSEL: Carey Haughwout, Public Defender, and Ian Seldin, Assistant Public Defender, West Palm Beach, for appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, and James J. Carney, Sr. Assistant Attorney General, West Palm Beach, for appellee.

JUDGES: GUNTHER, POLEN and GROSS, JJ., concur.

OPINION: PER CURIAM.

After a jury trial, Myron Franklin was convicted of robbery with a firearm, aggravated fleeing and eluding, and grand theft of a motor vehicle.

Central to the convictions were two statements Franklin gave in the hospital. The Miranda **n1** warnings given in this case were deficient in the same way that the warnings were deficient in *Roberts v. State, 874 So. 2d 1225, 2004 Fla. App. LEXIS 7497, No. 4D02-4490, 2004 WL 1161666 (Fla. 4th DCA May 26, 2004)* and *West v. State, 876 So. 2d 614, 2004 Fla. App. LEXIS 8362, No. 4D03-2027 (Fla. 4th DCA June 16, 2004)*, also decided today.

n1 *Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).*

At the suppression hearing, the defense offered ninety rights forms obtained from federal and state law enforcement agencies. Eighty-nine of the ninety forms properly indicated that the suspect could consult with a lawyer during questioning. Only the form utilized in this case omitted that portion of the Miranda warning.

As this court held in *West* and *Roberts*, United States Supreme Court cases have established that the omitted portion of the Miranda warning is crucial. For example, in *Duckworth v. Eagan, 492 U.S. 195, 106 L. Ed. 2d 166, 109 S. Ct. 2875 (1989)*, the Supreme Court specified that "reviewing courts . . . need not examine *Miranda* warnings as if construing a will or defining the terms of an easement." *Id. at 203*. However, the Court noted: "*Miranda* does not require that attorneys be producible on call, but only that the suspect be informed . . . that he has a right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one." *Id. at 204* (emphasis added).

Furthermore, the error in this case was not harmless. Harmless error exists where the state can prove beyond a reasonable doubt that the error did not contribute to the verdict. See *State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986)*; *Sims v. State, 839 So. 2d 807, 811 (Fla. 4th DCA 2003)*. "Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." *DiGuilio, 491 So. 2d at 1135*.

Here, Franklin's two statements filled in gaps in the state's case. We cannot say beyond a reasonable doubt that they did not contribute to the verdict.

Reversed and remanded for a new trial.

GUNTHER, POLEN and GROSS, JJ., concur.

GORMAN ROBERTS, JR., Appellant, v. STATE OF FLORIDA, Appellee.

CASE NO. 4D02-4490

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

874 So. 2d 1225; 2004 Fla. App. LEXIS 7497; 29 Fla. L. Weekly D 1265

May 26, 2004, Opinion Filed

SUBSEQUENT HISTORY: Rehearing denied by *Robert v. State, 2004 Fla. App. LEXIS 10699* (Fla. Dist. Ct. App. 4th Dist., July 2, 2004)

Released for Publication July 2, 2004.

PRIOR HISTORY: Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Victor Tobin, Judge; L.T. Case No. 02-004214 CF 10 A.

DISPOSITION: REVERSED in part, AFFIRMED in part and REMANDED.

LexisNexis(R) Headnotes

COUNSEL: Ellis S. Rubin of the Law Offices of Ellis Rubin and Robert I. Barrar, Miami, for appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, and Jeanine M. Germanowicz, Assistant Attorney General, West Palm Beach, for appellee.

JUDGES: TAYLOR, J. STONE and KLEIN, JJ., concur.

OPINION BY: TAYLOR

OPINION: TAYLOR, J.

Gorman Roberts appeals his conviction for manslaughter in the tragic drowning death of five-year old Jordan Payne in a local canal. He contends that his post-arrest videotaped statement should have been suppressed, because the *Miranda* **n1** warning he received failed to inform him that he had a right to have an attorney present during questioning. As a result, he argues, he did not knowingly and intelligently waive his constitutional rights under *Miranda*. We agree and reverse.

n1 *Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).*

When the police picked up Roberts and told him that he was being charged with Jordan's murder, he was taken to the police station for questioning. At the time Roberts was seventeen years old with an IQ of 67. After an unsuccessful attempt to reach Roberts's guardian by phone, the detective read Roberts his rights from the Broward Sheriff's Office (BSO) rights form. That form reads in pertinent part:

> **MIRANDA WARNING**
>
> BEFORE I ASK YOU ANY QUESTIONS, I WANT TO ADVISE YOU OF YOUR CONSTITUTIONAL RIGHTS.
>
> 1. You have the right to remain silent.
>
> 2. Anything you say can be used against you in a court of law.

> 3. You have the right to talk with a lawyer and have a lawyer present before any questioning.
>
> 4. If you cannot afford a lawyer, one will be appointed to represent you before any questioning if you wish.

Nowhere does the form advise Roberts of his right to have a lawyer present *during* questioning.

In the videotaped statement that followed, Roberts said that he, Jordan, and two other young boys were playing wrestling near the canal. Roberts acknowledged touching Jordan on the forehead when he tried to separate him and another boy while they were wrestling, but he denied pushing Jordan into the water. He said that as he was walking back up the canal edge, he heard something hit the water, then saw the little boy moving up and down in the water. Afraid to jump in the lake, he started crying and then fled the scene in a panic.

The defense moved unsuccessfully both before and during the trial to suppress this videotape, arguing, *inter alia*, that the *Miranda* warning given prior to the statement was constitutionally defective. Through the testimony of lay and expert witnesses, the state attempted to prove that the defendant, despite his youth and mild retardation, understood his *Miranda* right to have a lawyer with him during interrogation. However, none of the court-appointed psychologists could render a definitive opinion that the defendant understood this particular right. The only expert who actually interviewed the defendant concerning his understanding of this right testified that the defendant did *not* understand that he could have an attorney present during questioning. Dr. Shari Bourg-Carter testified that when she met with the defendant, she questioned him about his understanding of the right to counsel. She asked him "when the police have to give you an attorney and whether you have to get one when you are being questioned." His response was:

> No. Only in the courtroom. You can't have one when you're questioned because the cops wouldn't want one. Why not? Because you might not say what they want you to say.

Another psychologist, Dr. Ceros-Livingston, described the defendant's low IQ test results over the years, and, though unable to reach any conclusions concerning the defendant's understanding of his rights, found it plausible that he did not fully understand his right to have an attorney present during questioning by the police.

At the suppression hearing, the trial court took judicial notice of eighty-nine different *Miranda* rights forms used by other Florida law enforcement agencies. They all contained the warning that the accused is entitled to an attorney during questioning, or words to that effect. Although the court acknowledged that this element was missing in the BSO form, it denied the motion to suppress, finding that the defendant was competent and gave his statement freely and voluntarily without any police coercion.

After the jury returned a guilty verdict on the manslaughter charge, the defendant moved for judgment of acquittal notwithstanding the verdict. The court denied the motion, but noted troubling inconsistencies in the testimony of the two ten-year old state witnesses and commented that its decision was "a very close call."

The defendant contends that the *Miranda* warning recited by the police from the BSO rights form was defective in that it failed to advise him that he was entitled to have an attorney present *during* questioning as well as *before* questioning. For this reason, he argues, the motion to suppress his post-arrest videotaped statement was improperly denied.

We review *de novo* the adequacy of *Miranda* warnings, as a question of law. *See C.A.M. v. State, 819 So. 2d 802, 804 (Fla. 4th DCA 2001).*

In *Miranda*, the Supreme Court said that the right to have counsel present during an interrogation is indispensable to the protection of the Fifth Amendment privilege against self-incrimination. The Court described the right-to-counsel warning which must be given:

> We hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . . As with the [other] warnings . . . this warning is an absolute prerequisite to interrogation.

384 U.S. at 471-72.

The Court, however, pointed out that *Miranda* warnings need not be given in the exact form described in *Miranda. Id. at 490*; *see also California v. Prysock, 453 U.S. 355, 359, 69 L. Ed. 2d 696, 101 S. Ct. 2806 (1981)*("Quite to the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures."). In *Duckworth v. Eagan, 492 U.S. 195, 203, 106 L. Ed. 2d 166, 109 S. Ct. 2875 (1989)*, the Court reiterated that reviewing courts "need not examine *Miranda* warnings as if construing a will or defining the terms of an easement." Rather, the inquiry is whether the warning uses equivalent and adequate language that fulfills the substantive requirements of *Miranda. Id.*

Florida courts have consistently interpreted *Miranda* as requiring notification that a person in custody has a right to have counsel present not only before interrogation but *during* interrogation as well. *See Ramirez v. State, 739 So. 2d 568 (Fla. 1999)*; *Sapp v. State, 690 So. 2d 581, 583-84 (Fla. 1997)*; *Holland v. State, 813 So. 2d 1007, 1009 (Fla. 4th DCA 2002)*; *T.S.D. v. State, 741 So. 2d 1142 (Fla. 3d DCA 1999)*; *Statewright v. State, 278 So. 2d 652 (Fla. 4th DCA 1973)*; *James v. State, 223 So. 2d 52 (Fla. 4th DCA 1969).*

Similarly, federal courts have recognized that advisement of the right to counsel during questioning is a vital part of the *Miranda* procedural safeguards. *See United Stated v. Noti, 731 F.2d 610, 614 (9th Cir. 1984)*; *United States v. Anthon, 648* F.2d 669 (10th Cir.1981); *Atwell v. United States*, 398 F.2d 507 (5th Cir. 1968); *Groshart v. United States, 392 F.2d 172, 175 (9th Cir. 1968) ; Windsor v. United States, 389 F.2d 530 (5th Cir. 1968).*

Federal courts, however, have reached different conclusions as to the adequacy of the *Miranda* warnings where, as here, a suspect was advised of the right to consult with counsel before questioning, but not advised of the right to have an attorney present during interrogation. Some courts have held that further express warnings of the right to an attorney during interrogation must be given. *See United States v. Bland, 908 F.2d 471 (9th Cir. 1990) ; United States v. Oliver, 505 F.2d 301 (7th Cir. 1974) ; Chambers v. United States, 391 F.2d 455 (5th Cir. 1969) ; United States v. Fox, 403 F.2d 97 (2d Cir. 1968)*; *United States v. Averell, 296 F. Supp. 1004 (E.D.N.Y. 1969) ; Pemberton v. Peyton, 288 F. Supp. 920 (E.D. Va. 1968)*; *see also Brown v. Crosby, 249 F. Supp. 2d 1285, 1302 (S.D. Fla. 2003)*(noting that advising the suspect of the right to have an attorney present before being asked any questions is not the same as advising him of the undeniable right to have an attorney present during questioning).

Other federal courts have found that additional warnings, expressly referring to the right to an attorney during interrogation, were unnecessary. *See Evans v. Swenson, 455 F.2d 291 (8th Cir. 1972) ; United States v. Vanterpool, 394 F.2d 697 (2d Cir. 1968)*; *Coyote v. United States, 380 F.2d 305 (10th Cir. 1967)*. These courts have deemed the omission of the warning insignificant, reasoning that the right to counsel during interrogation can be inferred from warnings given as to the right to counsel before interrogation.

In cases where the suspect was informed generally of the right to an attorney, without being told *when* the attorney could

assist, there is a split of authority among the federal courts as to whether this "timeless" warning is constitutionally sufficient. Our court is among those which have ruled that such an ambiguous statement is *not* constitutionally sufficient. *See James v. State, 223 So. 2d 52 (Fla. 4th DCA 1969); see also Atwell, 398 F.2d at 510 ; Groshart, 392 F.2d at 175 ; Chambers v. United States, 391 F.2d 455, 456 (5th Cir. 1968) ; James, 223 So. 2d at 55; but see United States v. Frankson, 83 F.3d 79, 82 (4th Cir. 1996); United States v. Caldwell, 954 F.2d 496, 502 (8th Cir. 1991) ; United States v. Dizdar, 581 F.2d 1031 (2d Cir. 1978) ; United States v. Adams, 484 F.2d 357, 361-62 (7th Cir. 1973) ; Evans v. Swenson, 455 F.2d at 295-96 (8th Cir. 1972); United States v. Lamia, 429 F.2d 373, 376-77 (2d Cir. 1970).*

Here, the BSO warning does not fail to state altogether when an attorney can be present. Rather, it explicitly states that an attorney can be present *before* questioning. This use of the "before questioning" warning alone, however, has suggested to at least one court that the suspect was affirmatively misled into believing that the attorney could *not* be present *during* questioning itself. *See Caldwell, 954 F.2d at 504* (distinguishing *United States v. Fox, 403 F.2d 97 (2d Cir. 1968))*. Perhaps for this reason, courts confronting warnings with just the "before questioning" advice have deemed them constitutionally infirm. *See United States v. Bland, 908 F.2d 471 (9th Cir. 1990) ; Noti, 731 F.2d at 615 ; Fox, 403 F.2d at 100 (2d Cir. 1968) ; Windsor, 389 F.2d at 533 (5th Cir. 1968); see also Brown v. Crosby, 249 F. Supp. 2d at 1302.*

We agree with the defendant that the *Miranda* warnings given to him were inadequate in failing to inform him that he had a right to have counsel present during interrogation. This inadequacy militated against a finding that the defendant knowingly and intelligently waived his *Miranda* rights. *See Brown, 249 F. Supp. 2d at 1291* (discussing that a waiver of *Miranda* rights is "knowingly and intelligently" made only if the defendant has a full awareness of the nature of the right being abandoned and the consequences of his decision to abandon it).

We reject the state's argument that there was sufficient evidence upon which the trial court could rely in finding that the defendant understood his *Miranda* right to have an attorney present during questioning. The state contends that testimony of the state's psychologists that the defendant was "barely" mentally retarded and familiar with the juvenile justice system, as well as testimony of the defendant's high school coach and assistant principal that the defendant was "street smart" and appeared to be normal, supported the trial court's finding that the defendant understood his right to a lawyer. However, as the Supreme Court said in stressing the importance of *Miranda* warnings:

> No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

Miranda, 384 U.S. at 471-72.

The state suggests that another indicator of the defendant's understanding of his right to have a lawyer present during questioning is the separate "waiver of rights" section of the *Miranda* form he signed. This form states:

> I, Gorman Roberts, have read this statement of my rights or have had it read to me and I understand what my rights are. With these rights in mind I am willing to answer questions without a lawyer present. This waiver of rights is signed of my own free will without any threats or promises having been made to me.

> In the state's view, this acknowledgment was sufficient to clarify any possible confusion as to whether or not an attorney could be present during questioning. We disagree, however, that the signed

> form, in conjunction with the warnings given, sufficiently conveyed the substance of the *Miranda* requirements or served to corroborate the defendant's knowing and intelligent waiver of his rights. The right to appointed counsel during questioning cannot readily be inferred from the waiver form. This form is not the "effective and express explanation" of the right to counsel required by *Miranda*. *Miranda* requires a clear, understandable warning from law enforcement officers that conveys all of a defendant's rights. "Only through such a warning is there ascertainable assurance that the accused was aware of this right." *Miranda, 384 U.S. at 471-72.*

Because the *Miranda* warnings the defendant received while in custody were inadequate to fully inform him of his constitutional rights, we conclude that the trial court erred in admitting the defendant's videotaped statement into evidence. Further, we are unable to conclude that this error was harmless beyond a reasonable doubt, given that the bulk of the evidence against defendant was provided by two young witnesses whose credibility was sharply contested at trial. **n2** Accordingly, we reverse defendant's conviction and sentence and remand this cause for a new trial. We affirm as to all other issues raised by the defendant.

n2 One of the issues raised by the defendant in this appeal is the trial court's denial of his motion to strike the testimony of one the state's main witnesses after the court acknowledged that the witness was "unworthy of belief" and did not appear "to know the difference between truth or fiction."

REVERSED in part, AFFIRMED in part and REMANDED.

STONE and KLEIN, JJ., concur.

NNEKA WEST, Appellant, v. STATE OF FLORIDA, Appellee.

CASE NO. 4D03-2027

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT
876 So. 2d 614; 2004 Fla. App. LEXIS 8362; 29 Fla. L. Weekly D 1444

June 16, 2004, Opinion Filed

SUBSEQUENT HISTORY: Rehearing denied by *West v. State, 2004 Fla. App. LEXIS 11878 (Fla. Dist. Ct. App. 4th Dist., July 30, 2004)*

PRIOR HISTORY: Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Paul L. Backman, Judge; L.T. Case No. 01-4118 CF10A.

DISPOSITION: Reversed.

LexisNexis(R) Headnotes

COUNSEL: Carey Haughwout, Public Defender, and Joseph R. Chloupek, Assistant Public Defender, West Palm Beach, for appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, and Sue-Ellen Kenny, Assistant Attorney General, West Palm Beach, for appellee.

JUDGES: KLEIN, J. WARNER, J., concurs. GROSS, J., concurs specially with opinion.

OPINION BY: KLEIN

OPINION: KLEIN, J.

Appellant was convicted of first degree murder and contends that the trial court should have suppressed her confession because her *Miranda* warnings were inadequate. We reverse.

In March, 2001, appellant was arrested, and after being read what purported to be a *Miranda* warning, admitted her involvement in a plan which resulted in the victim being murdered. At a hearing on her motion to suppress, a detective testified that he read appellant her rights from a standard Broward County Sheriff's Office *Miranda* form. He did not inform appellant that she was entitled to have counsel present during questioning or that she could stop the interrogation at any time during questioning. The detective explained:

> I told her, you have the right to remain silent, that anything that you say can be used against you in a court of law. You have the right to talk to a lawyer and have a lawyer present before any questioning and if you cannot afford a lawyer, one will be appointed to represent you or for any questions if you wish. And I asked her, do you understand the rights that we just read and that is where she initialed, yes.
>
> Q. That word yes, sir, is that your handwriting or Ms. West's handwriting?
>
> A. No, that's Nneka's, that's Ms. West's handwriting.
>
> Q. After that at the end of the rights waiver it says, I see where it says Nneka West. Who put Nneka West's name in?
>
> A. Ms. West.
>
> Q. Could you make out what it says after that?

> A. It says, I, the person you're meeting with, and Ms. West had printed her name, have read this statement of my rights or had it read to me and I understand what my rights are. With theses [sic] rights in mind, I am willing to answer questions without a lawyer present. This waiver of rights is signed of my own free will without any threats or promises having been made to me.

As to the first ground of appellant's motion to suppress, that she was not advised of her right to have an attorney present during questioning, *Miranda v. Arizona, 384 U.S. 436, 471-72, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966)*, held:

> An individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. . . . [emphasis supplied].

With specific reference to the failure to advise a defendant of the right to have a lawyer present during interrogation, the *Miranda* court further stated:

> As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

Id. at 471.

There is authority supporting the view that a *Miranda* warning which fails to advise of the right to counsel during

interrogation makes a confession inadmissible as a matter of law. *United States v. Bland, 908 F.2d 471 (9th Cir. 1990)*; *United States v. Oliver, 505 F.2d 301 (7th Cir. 1974)*; *Chambers v. United States, 391 F.2d 455 (5th Cir. 1968). See also, Thompson v. State*, 595 So. 2d 16, 17 (Fla. 1992) (appears to hold that the failure to advise defendant that if he could not afford an attorney the state would provide one at no cost rendered confession inadmissible as a matter of law).

In *Miranda*, with reference to a situation in which no warning was given, the Court stated:

> The *Fifth Amendment* privilege is so fundamental to our system . . . and the expedient of giving an adequate warning . . . so simple, [that] we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.

Id. at 468.

At the hearing on the motion to suppress, in which the state had the burden of proving by a preponderance of the evidence that appellant waived her rights, *Ramirez v. State, 739 So. 2d 568 (Fla. 1999)*, the evidence centered on whether appellant was of sufficient intelligence to waive her rights. Appellant, who had never before been arrested, scored sixty-one on an IQ test, indicating that she was mildly retarded. Whether she had the intellectual capacity to intelligently waive her rights was disputed by experts. Without addressing the facial inadequacy of the warning, the trial court denied the motion to suppress, finding that under the totality of the circumstances appellant understood her rights and knowingly and intelligently waived them.

The problem with the trial court's finding is that it overlooks that appellant was not informed that she was entitled to have counsel present during interrogation or that she could stop the

interrogation at any time. Nor did the state produce evidence that appellant knew this and knowingly waived these rights. Her confession should accordingly have been suppressed.

We therefore reverse for a new trial.

WARNER, J., concurs.

GROSS, J., concurs specially with opinion.

CONCUR BY: GROSS

CONCUR: GROSS, J., concurring specially.

My reading of the case law is that the law is flexible in the form that Miranda warnings are given, but rigid as to their required content.

It is unusual that a problem concerning the content of Miranda warnings has arisen in this day and age. *Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966)*, was decided thirty-eight years ago. A recent Westlaw search revealed that Miranda has been cited 42,046 times. Declining the invitation to overrule Miranda, the United States Supreme Court wrote that "Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson v. United States, 530 U.S. 428, 444, 147 L. Ed. 2d 405, 120 S. Ct. 2326 (2000).*

Most law enforcement agencies comply with Miranda without incident, since Miranda has not proved to be a roadblock to effective law enforcement. A recent article concludes that "there is no good evidence that Miranda has substantially depressed confession rates or imposed significant costs on the American criminal justice system." George C. Thomas III & Richard A. Leo, *The Effects of* Miranda v. Arizona: *"Embedded" in Our National Culture? 29 CRIME & JUST. 203 (2002).*

The consensus of the first generation (1966-73) of empirical scholarship on the effect of Miranda, "was that the Miranda rules had only a marginal effect on the ability of the police to elicit confessions and on the ability of prosecutors to win convictions, despite the fact that some detectives continued to perceive a substantial Miranda impact." *Id. at 238.*

Beginning in 1996, the second generation of Miranda studies "have generated considerable interpretive disagreement, debate, and commentary." *Id. at 239.* Thomas and Leo observed that there appears to be relatively little dispute among second-generation researchers on several aspects of Miranda's real-world effects. First, police appear to issue and document Miranda warnings in virtually all cases. Second, police appear to have successfully "adapted" to the Miranda requirements. In practice, this means that police have developed strategies that are intended to induce Miranda waivers. Third, police appear to elicit waivers from suspects in 78-96 percent of their interrogations, though suspects with criminal records appear disproportionately likely to invoke their rights and terminate interrogation. Fourth, in some jurisdictions police are systematically trained to violate Miranda by questioning "outside Miranda" - - that is, by continuing to question suspects who have invoked the right to counsel or the right to remain silent. Finally, some researchers have argued that Miranda eradicated the last vestiges of third-degree interrogation present in the mid-1960s, increased the level of professionalism among interrogators, and raised public awareness of constitutional rights. *Id. at 244-45* (internal citations omitted). The article concludes that "what the first-generation researchers suggested of their era may be true of ours: Miranda's impact in practice may be virtually negligible." *Id. at 245.*

The requirement of Miranda for the warning at issue in this case is not open to the wiggle room of creative interpretation.

As Judge Klein writes in the majority opinion, Miranda explicitly holds that as "an *absolute prerequisite* to interrogation,"

a suspect in custody "*must* be *clearly* informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." *384 U.S. at 471* (emphasis added). Similar to the warning on the right to remain silent, the Supreme Court chose the requirement of a specific warning on the right to counsel as a "clearcut fact," to avoid "assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, [which] can never be more than speculation." *Id. at 468-69, 471-72.*

In *California v. Prysock, 453 U.S. 355, 360, 69 L. Ed. 2d 696, 101 S. Ct. 2806 (1981)*, the Supreme Court held that the Miranda warnings need not be a "talismanic incantation" from the case, so long as the rights are adequately conveyed. The Court noted that it had "never indicated that the 'rigidity' of Miranda extends to the precise formulation of the warnings given a criminal defendant." *Id. at 359.* The Court emphasized that the police had "fully conveyed" to the defendant "his rights as required by Miranda." *Id. at 361.* The Court observed that Prysock did not involve the right at issue in this case. Id. ("This is not a case in which the defendant was not informed of his right to the presence of an attorney during questioning . . . .").

Most federal courts of appeals "have recognized the importance of informing suspects that they have the right to have a lawyer present prior to and during interrogation." *Brown v. Crosby, 249 F. Supp. 2d 1285, 1306 (S.D. Fla. 2003)* (cases cited); see also *United States v. Noti, 731 F.2d 610, 614-15 (9th Cir. 1984)*; Martin J. McMahon, Annotation, *Necessity that Miranda Warnings Include Express Reference to Right to Have Attorney Present During Interrogation, 77 A.L.R. FED. 123, 131-35 (1986).*

A few courts have held that when omitted from Miranda warnings, the right to a lawyer "during interrogation" may be inferred. See *People v. Valdivia, 180 Cal. App. 3d 657, 226 Cal.Rptr. 144, 148 (Cal. Ct. App. 1986)*; *State v. Butzin, 404 N.W.2d 819, 825 (Minn. Ct. App. 1987)*. These cases appear to

contravene Miranda's language that the right be explicitly given and that "no amount of circumstantial evidence that a person may have been aware of this right will suffice to stand in its stead." *Miranda, 384 U.S. at 471-72.*

Nothing in any Supreme Court opinion suggests that it has relaxed the rigidity of Miranda regarding the *content* of the required warnings. At least three justices have expressed their concern about a Miranda warning identical to the one in this case, also arising from Broward County. In a statement accompanying a denial of a petition for writ of certiorari, Justice Breyer wrote:

> Although this Court has declined to demand "rigidity in the *form* of the required warnings," *California v. Prysock, 453 U.S. 355, 359, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981)* (*per curiam*), the warnings given here say nothing about the lawyer's presence during interrogation. For that reason, they apparently leave out an essential *Miranda* element. *384 U.S., at 470, 86 S. Ct. 1602.*
>
> Because this Court may deny certiorari for many reasons, our denial expresses no view about the merits of petitioner's claim. And because the police apparently read the warnings from a standard-issue card, I write to make this point explicit. That is to say, if the problem purportedly present here proves to be a recurring one, I believe that it may well warrant this Court's attention.

Bridgers v. Texas, 532 U.S. 1034, 149 L. Ed. 2d 779, 121 S. Ct. 1995 (2001).